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In The

Supreme Court of the United States

October Term, 1989

ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Petitioners,

v.

BABCOCK & WILCOX COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Whether, under the Employee Retirement Income Security Act, partial pre-emption of state anti-discrimination laws in the interests of uniform plan administration is warranted when benefits are paid either pursuant to one-time local contracts or non-disclosed management policies and where regulatory concerns are absent?

2. Assuming pre-emption does apply, whether §4(f)(2) of the Age Discrimination in Employment Act – which exempts certain discriminatory action taken pursuant to an employee benefit plan from violation of the Act – permits an employer upon plant closure to provide severance benefits to all discharged employees except those eligible to retire?

LIST OF PARTIES

The Petitioners in this matter are the Illinois Human Rights Commission, the Illinois Department of Human Rights, and sixteen (16) individuals, namely: Edmund Henkelman, Oleta Britt, Elden Amans, Florence Maycraft, Dwight Van Fleet, Gerald Stahl, James Breseman, Charles Rewerts, Godfrey Farrell, Thomas Ivy, John Downing, Arthur Helgerson, Roland Berglund, Margaret Dreesen, John Campbell and Walter Pierce.

The Respondent is the Babcock & Wilcox Company.

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No. _____

In The

Supreme Court of the United States

October Term, 1989

ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Petitioners,

v.

BABCOCK & WILCOX COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND JUDICIAL DISTRICT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court for the Second Judicial District, entered in the above-entitled proceeding on October 13, 1989.

OPINIONS BELOW

The opinion of the Illinois Appellate Court is reprinted in the appendix hereto, p. App. 1, *infra*, and is reported *sub nom. Babcock & Wilcox Co. v. Illinois Human*

Rights Commission, et al., at 189 Ill. App. 3d 827, 545 N.E.2d 799 (2nd Dist. 1989).

The administrative decision of the Illinois Human Rights Commission is not reported, but is reprinted in the appendix. (p. App. 40).

JURISDICTION

The judgment of the Illinois Appellate Court, Second Judicial District was entered on October 13, 1989, reversing the order of the Human Rights Commission, finding age discrimination violations by the respondent under the Illinois Human Rights Act. On January 31, 1990, the Illinois Supreme Court denied a timely petition for leave to appeal. (p. App. 58). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS

Section 514 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1144.

Section 4(f)(2) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(f)(2).

Section 2-104 of the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, ¶2-104(5)(a)(1987)

The above statutes are reproduced in the appendix beginning at p. App. 59.

STATEMENT OF THE CASE

The individual petitioners are 16 former employees of the respondent Babcock & Wilcox Company ("B & W") at its Rockford, Illinois plant. B & W ceased its operations at the Rockford plant on October 31, 1983, and all employees (including the 16 named herein) were terminated from employment on or before that date. Upon plant closure, B & W granted severance pay to all laid-off workers *except* those employees "eligible" to retire – a class which included the 16 employees before this Court. With one exception, these petitioners were eligible for early or special early retirements under B & W's two pension plans maintained for hourly (or union) employees and for salaried employees. Neither of the pension plans in force at the time provided for severance pay offsets against deferred vested pensions or for mandatory retirement applicable to these employees.

B & W's severance pay decisions stemmed from different sources. The *hourly* employees (through their union) and B & W entered into a Memorandum of Agreement, upon B & W's decision to close the plant. (Ex. B at 1).[1] Pursuant to the Memorandum, B & W agreed to pay a lump sum "separation allowance" to all of the soon-to-be terminated employees, *except* those who were "eligible for a normal, early, special early or disability retirement." (Ex. B at 2).

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[1] A citation to the unpaginated Supplemental Record on appeal, containing exhibit documents, will refer to the exhibit and a page reference where necessary, as above. All other needed citations will indicate the record page number preceded by "R." as in R. 100.

In denying severance to the *salaried* employees, B & W relied on administrative policy #1414-A1, relating to termination allowances. Although termination allowances were payable upon discharge due to a plant closure, allowances were not payable: "under the following types of *separation*: . . . 3. *Retirement* where the employee is immediately eligible under the Employee Retirement Plan . . . " (Ex. L at 2) (emphasis supplied). Considering policy #1414-A1 to be a "guide" for managers and not part of the terms of employment, B & W did not distribute the policy to employees nor tell them of the benefit. (R. 151, 154).

During November of 1983, the former B & W employees filed charges of age discrimination with the petitioner Illinois Department of Human Rights ("Department"), an agency which investigates civil rights violations under the Illinois Human Rights Act ("HRA"). In March of 1985, the Department, on behalf of itself and the employees, filed a Complaint against B & W with the petitioner Human Rights Commission ("Commission"), the adjudicatory agency under the HRA. The matter was heard on cross-motions for summary judgment before a Commission administrative law judge who ruled against B & W in a recommended decision.

Before the Commission panel, B & W raised objections to the recommended decision which, as here relevant, included its contention that its severance decisions fell under the protection of the HRA's "Merit and Retirement System" exception to the Act's discrimination prohibition. Similar to §4(f)(2) of the Age Discrimination in Employment Act ("ADEA") (p. App. 61-62), the HRA's §2-104(5)(a) allows for certain differential treatment when

applying the terms of a merit or retirement plan, as long as such system is not a subterfuge for or does not have the effect of unlawful discrimination. (p. App. 63-64). The Commission rejected B & W's claim of protection under the exception provision on two grounds: (1) the severance decision to exclude older workers did not meet the age-related "cost-justification" criterion in accord with the federal case law and regulation at the time; and (2) by not providing severance income to ease the unemployment period, the complainants were forced to choose between receiving no income or taking their early retirement (which also precluded normal retirement with higher benefits at a later date). (R. 477-485).

In August, 1988, B & W appealed the Commission's order to the Illinois Appellate Court. After briefing and oral argument on the points of error raised by B & W, this Court issued its decision in *Public Employees Retirement System of Ohio v. Betts*, ___ U.S. ___, 109 S.Ct. 2854 (1989), rejecting the prior construction of ADEA's §4(f)(2) protection as requiring an age-related cost justification. Without supplemental briefing and in a 2-to-1 decision, the Appellate Court *sua sponte* determined that the severance practices at issue were "employee welfare benefit plans" under the Employee Retirement Income Security Act ("ERISA"), which pre-empted the HRA to the extent it differed from the ADEA. (p. App. 17-23). The Appellate Court ruled that the severance policies were not shown to be a subterfuge for discrimination under *Betts*, nor did they have the effect of unlawful discrimination since all employees received some compensation from B & W's "age-neutral" action. (p. App. 28-30). The dissent disagreed that ERISA pre-emption applied, relying on *Fort*

Halifax Packing Co. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211 (1987), and further concluded that B & W's severance decisions constituted unlawful discrimination where age alone determined whether similarly situated employees with vested pensions received severance *and* pension rights, or merely received their pensions. (p. App. 31-39).

Jurisdiction and Presentation of the Questions

The issue of ERISA pre-emption of a cause of action under the HRA was addressed and denied by the administrative law judge. (See. p. App. 44). B & W did not advance the issue before the Commission or Appellate Court. Involuntary retirement was one basis for the Commission's decision under state law only, since pre-emption was not then an issue. (p. App. 52-54). After the Appellate Court decided, without briefing by the parties, that pre-emption applied, petitioners sought review by the Illinois Supreme Court on this point. The Supreme Court denied leave to appeal. (p. App. 58).

The Appellate Court's reversal of the Commission's summary ruling remanded the matter for further proceedings. Having been denied review of the federal questions by the Illinois Supreme Court, petitioners seek review at this time despite the remand order. The finding of ERISA pre-emption of state law is conclusive at this time and both would not be affected by subsequent proceedings and thereafter would not be appealable. If state law was correctly pre-empted to the extent it is broader than ADEA's prohibitions, then the federal question of whether the employment practice constituted involuntary

retirement under ADEA (as was found by the Commission under the HRA) would survive and require decision despite remand to the Commission. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478-81, 95 S.Ct. 1029 (1975).

REASONS FOR GRANTING THE WRIT

I.

AN UNRESOLVED CONFLICT IN PRINCIPLE OVER ERISA PRE-EMPTION EXISTS (1) AMONG THE DECISIONS OF THIS COURT AND (2) BETWEEN THOSE DECISIONS AND THE PURPOSES OF ERISA, WHICH DETRIMENTALLY AFFECTS THE STATE'S INTEREST IN ENFORCING ITS FAIR EMPLOYMENT LAWS.

The well-settled purpose of ERISA is to promote and safeguard the interests of employees in their employee benefit plans, while at the same time, through pre-emption of state law, protect employers from conflicting state regulations. However, certain employer practices should not constitute a "plan" and are not being administered under ERISA. Such is the case with severance benefits provided: (1) under a one-time, local contract; or (2) pursuant to a non-disclosed policy, not kept in compliance with ERISA standards. Classifying these types of employer practices as "plans" for pre-emption purposes is at cross-purposes with ERISA. In the absence of plan administration under ERISA, the justification for federal pre-emption of state law fails. When federal pre-emption occurs in these instances, an employer is not subject to ERISA nor subject to the full scope state fair employment laws. This Court's attention is necessary to address the

appropriateness of pre-emption with respect to employment activities such as are presented in this case.

This Court recently has stated that the congressional intent of ERISA's pre-emption provision, 29 U.S.C. §1144 (p. App. 59), is to protect employers from inconsistent state and local regulation of employee benefit plans and to afford employers the advantage of a single set of standards. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 2216-17 (1987). In distinguishing between "plans" and "benefits" for pre-emption purposes, *Fort Halifax* pointed out that:

> Only a *plan* embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

482 U.S. at 11-12, 107 S.Ct. at 2217 (emphasis supplied). There, this Court declined to pre-empt a Maine statute requiring a one-time, lump-sum severance payment upon plant closure. *Fort Halifax* emphasized that the focus of ERISA is "on the administrative integrity of benefit plans" – such as the requirements of reporting, disclosure and fiduciary responsibility. 482 U.S. at 15, 107 S.Ct. at 2219. See also 29 U.S.C. §§1021-1031, 1101-1114 (describing the uniform standards required of an employer in establishing a welfare plan).

ERISA's pre-emption provision has been enforced where the state law requires a particular procedure for calculating the benefits of a pension plan. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 506, 101 S.Ct. 1895 (1981) (pre-emption of state statute which prohibited federally permissible offset of worker's compensation award from pension plan benefits). In *Alessi*, it was clear that the

administration of a bona fide ERISA-regulated pension plan[2] was affected by state law.

Expressing the same concerns for the administration of certain medical and disability plans and applying the ERISA pre-emption savings clause, 29 U.S.C. §1144(d) (p. App. 59-60), the *Shaw* Court partially pre-empted New York's Human Rights Law to the extent that it differed from Title VII. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 89, 97-105, 103 S.Ct. 2890, 2900-2904 (1983). *Fort Halifax* emphasized that *Shaw*'s concern was for the cost and administrative inefficiencies (possibly resulting in the reduction of benefits) when an ERISA benefit plan is subject to varying fair employment laws.

Left unresolved from these decisions is the extent to which pre-emption applies when the employer provides an ERISA *benefit* in situations where ERISA's purpose of uniform *plan* administration is not implicated (as with the plant closure contract) or is ignored, thus also defeating the purpose of protecting the employees' interests (as with policy 1414-A1). Since federal law, such as Title VII and the ADEA, will save from pre-emption not-inconsistent state human rights legislation, the employer with an ERISA-regulated plan must comply with substantive provisions of federal anti-discrimination law. *Shaw*, 463 U.S. at 105-06, 103 S. Ct. at 2904. However, the *Shaw* rationale

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[2] Under ERISA, an employee benefit pension plan must comply with standards regarding participation, funding, and vesting, as well as the reporting, disclosure, and fiduciary requirements imposed on welfare benefit plans. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 89, 90-91, 103 S.Ct. 2890, 2896 (1983).

for such partial pre-emption only serves the congressional intent to pre-empt the field of regulation *if* there is an employee benefit plan being administered under ERISA.

Such is not the case here or with all employment practices. If every document written by an employer is construed as an ERISA-established "plan" just because it may provide employee benefits, then the application of ERISA's pre-emption provision becomes a vehicle to impose only federal substantive law upon employment conduct within the state. In short, simply by reducing to writing a decision to extend benefits, the employer alone (not ERISA with its concerns for uniform regulation) essentially would "pre-empt" state anti-discrimination law. An employer could thus insulate itself from state law when the interests of "plan" administration were not at stake.

The severance practices at bar are illustrative of the inappropriateness of partial pre-emption. In the case of the hourly employees, B & W entered into the contract in anticipation of plant closure. Under the guidance of *Fort Halifax*, the one-time obligation of writing a check "hardly constitutes the operation of a benefit plan" and creates no need for ongoing administration. 482 U.S at 12, 107 S.Ct. at 2218. Moreover, a purely local contract does not implicate a plan needing uniform regulation and pre-emptive protection from varying regulations. The employer is completely free to negotiate different contractual terms regarding severance benefits with a bargaining unit in another state if the necessity arises.

For the salaried employees, the termination allowance policy was admittedly not disclosed as an

employee benefit to the employees.[3] While an unfunded corporate severance pay policy has been deemed an ERISA welfare benefit plan, the policy there was disclosed and included as a representation of benefits in the employee handbook. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 323 (2nd Cir. 1985) *summ. aff'd*, 477 U.S. 901, 106 S.Ct. 3267 (1986).

The Second Circuit in *Gilbert* also dealt with claimants' argument that the employer was estopped from invoking pre-emption of state law causes of action due to non-compliance with ERISA standards. While rejecting estoppel, the Court adopted a less deferential standard of review to resolve the "risk of unfairness" present when a non-compliant employer avoids state law liability through pre-emption. 765 F.2d 328-29. However, the Second Circuit's *Gilbert* decision preceded this Court's ruling in *Fort Halifax* and its denial of pre-emption when regulatory concerns over a plan were absent.

Issues of pre-emption necessarily involve a respect for the separate spheres of governmental authority. *Alessi*, 451 U.S. at 522, 101 S.Ct. at 1905. While Congress intended to regulate the field of employee benefit plans,

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[3] In *Arnold v. Babcock & Wilcox, Co.*, 154 Ill. App. 3d 863, 507 N.E.2d 218, 220 (2nd Dist. 1987) *aff'd* 123 Ill. 2d 67, 525 N.E.2d 59 (1988), the Appellate Court stated that employee handbooks did not refer to the termination allowance benefit, although plaintiffs had learned of the benefit from others. Throughout the *Arnold* litigation, however, the private parties agreed that the policy was an ERISA welfare benefit plan. Because *Arnold* did not involve discrimination, the State of Illinois' interest in the partial pre-emption of the HRA was neither at issue nor represented.

pre-emption is premised on the existence of a plan subject to the regulation of ERISA. When no distinction is made between (1) an "employee benefit plan" implicating or complying with ERISA regulation and (2) employer practices which fall outside that scope, the latter are allowed (through the protection of pre-emption) to rewrite state fair employment laws with the substantive provisions of federal law. Pre-emption then is used in a manner not contemplated by Congress, and the state's interest in enforcing its laws is frustrated. Consideration of this matter is necessary to resolve the federal and state interests at stake.

Assuming *arguendo* that the ERISA pre-emption was proper in this case, then this Court should address the federal question concerning ADEA's constructions as applied to the severance practices.

II.

THE UNSETTLED CONSTRUCTION OF THE ADEA AS TO THE DENIAL OF SEVERANCE PAY FOR RETIREMENT-ELIGIBLE EMPLOYEES PRESENTS AN IMPORTANT AND REOCCURRING FEDERAL QUESTION.

The practice of denying severance benefits to retirement-eligible employees affects the very persons who can least afford it. Studies have shown that older workers have a more difficult time obtaining employment than younger workers.[4] While congressional concern for the

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[4] See *Displaced Older Workers: Hearings Before the Select Committee on Aging of the U.S. House of Representatives*, 99th Cong., 1st Sess. 3 (1985).

unemployment and discrimination problems of older workers was the purpose for the passage of the ADEA, 29 U.S.C. §621(a)(3)&(4), the status of ADEA's construction has left unresolved that Act's application to the denial of severance to retirement-eligible workers. This Court's guidance is needed for federal and state courts adjudicating the rights of these workers in an area of law previously litigated upon a basis now held invalid by this Court.[5]

Until this Court's ruling in *Public Employees Retirement System of Ohio v. Betts*, ___ U.S. ___, 109 S.Ct. 2854 (1989), the age-related cost justification analysis was utilized to determine whether certain employment practices were a subterfuge for discrimination falling outside of ADEA's §4(f)(2) exemption provision. As here relevant, §4(f)(2)'s exemption provides that it is not unlawful for an employer to follow the terms of a bona fide employee benefit plan, which is not a subterfuge for discrimination, provided that the plan does not require or permit involuntary retirement. 29 U.S.C. §623(f)(2) (p. App. 61-62). See also Ill. Rev. Stat. ch. 68, ¶2-104(5)(a)(1987) (providing a similar exemption for merit and retirement systems under the HRA) (p. App. 63-64).

While *Betts* (a disability retirement case) struck down the cost justification requirement to disprove "subterfuge", it did not reach the issue which would resolve as a matter of law the severance pay practices presented in this and other cases. See *EEOC v. Westinghouse Electric*

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[5] See, e.g., *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3rd Cir. 1984) *cert. den.*, 469 U.S. 820 (1984) ("Westinghouse I"); *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984).

Corp., 869 F.2d 696 (3rd Cir. 1989) ("Westinghouse II") *vacated and remanded* ___ U.S. ___, 110 S.Ct. 37 (1989) (a similar severance pay case now on remand for reconsideration in light of *Betts*).

The inescapable importance of the construction of §4(f)(2) lies in the realization that the exemption analysis is reached only because age-disparate treatment in employment has occurred. The discriminatory employment practice can only be saved from its otherwise unlawful character if the §4(f)(2) exemption applies.[6] Protection under §4(f)(2) necessarily requires that the employer (1) observe the terms (2) of a bona fide (3) employee benefit plan (4) which is not a subterfuge for discrimination and (5) which does not require or permit involuntary retirement. The unsettled status of the third and fifth aspects of §4(f)(2) are advanced as a basis for certiorari.[7]

Betts specifically left unresolved "the precise meaning of the phrase 'any bona fide employee benefit plan such as retirement, pension or insurance plan'." ___ U.S. ___ at ___ n.6, 109 S.Ct. at 2856 n.6. Although ERISA regulates established severance pay plans as employee benefit plans (*Gilbert*, 765 F.2d at 325) pursuant to its

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[6] In the case at bar, the Appellate Court did not even question the human rights violation involved, though B & W argued that point first. Rather, the Appellate Court went directly to an analysis of the HRA's exemption provision in light of *Betts* – an unnecessary step without the preliminary conclusion that the severance practice was discriminatory.

[7] Petitioners would reserve the remaining components of §4(f)(2), should certiorari be granted, as inclusive issues when applied to this case.

definitional section in 29 U.S.C. §1002, ERISA's reference to benefit plans is not necessarily dispositive of §4(f)(2). The ADEA statutory language pre-dated ERISA by seven years and is used more restrictively as an exemption to broad discriminatory prohibitions. The state courts need guidance on the ERISA-ADEA relationship and construction of "employee benefit plan" when deciding state employment discrimination cases. The Appellate Court here assumed, without analysis, that the congressional usage of the phrase "employee benefit plan" in ERISA served the same purpose in ADEA despite ADEA's qualifying phrase of "such as a retirement, pension or insurance plan." 29 U.S.C. §623(f)(2) (p. App. 61).

Further, the 1978 congressional amendment to §4(f)(2) prohibits the terms of the plan from "requir[ing] or permit[ting] the involuntary retirement of any individual" because of age. (p. App. 62). See also 29 CFR §1625.9(b)(1) (amendment applies to plans established before 1978). The significant question raised is whether the denial of severance pay to retirement-eligible employees falls outside the protection of the exemption because it induces involuntary retirement by denying a benefit provided to other employees. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-25, 105 S.Ct. 613, 623 (1985) (seniority system which denies a privilege offered to younger workers permitted involuntary retirement and is not protected by §4(f)(2)). This Court remanded the *Betts* decision for a ruling on the involuntary retirement provision, and a divided panel of the Sixth Circuit recently concluded that the retirement plan at issue forced involuntary retirement where the retiree was not allowed the same benefit choices because of age. *Betts v. Hamilton*

County Board of Mental Retardation and Developmental Disabilities, Nos. 86-3676, 86-4034, ___ F.2d ___, 1990 U.S. App. LEXIS 4281 (6th Cir. March 26, 1990).

These employment practices also implicate an employee's vested retirement rights which are not subject to forfeiture under ERISA. 29 USC §1053. In this and other cases involving similar employment practices, the terms of the severance and retirement plans result in benefits to classes of workers as follows: 1) younger workers without vested pension rights receive severance; 2) younger workers with vested pensions receive severance and deferred pension; and 3) the retirement-eligible workers are "given" nothing but their pensions – a right which they already possessed. Whether this practice is permissible under ADEA deserves this Court's attention.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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May 1, 1990

No. 2-88-0735

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

BABCOCK & WILCOX COMPANY,	)	Appeal from
	)	Order of
	)	Illinois Human
Petitioner,	)	Rights
	)	Commission.
v.	)	
	)	
ILLINOIS HUMAN RIGHTS COMMISSION, EDMUND HENKELMAN, OLETA BRITT, ELDEN AMANS, FLORENCE MAYCRAFT, DWIGHT VAN FLEET, GERALD STAHL, JAMES BRESEMAN, CHARLES REWERTS, GODFREY FARRELL, THOMAS IVY, JOHN DOWNING, ARTHUR HELGERSON, ROLAND BERGLUND, MARGARET DREESEN, JOHN CAMPBELL, and WALTER PIERCE,	)	Charge Nos.
	)	1984CF-9003
	)	1984CF-0766
	)	1984CF-0792
	)	1984CF-0962
	)	1984CF-0969
	)	1984CF-0970
	)	1984CF-0971
	)	1984CF-0972
	)	1984CF-0974
	)	1984CF-0975
	)	1984CF-0976
	)	1984CF-0978
	)	1984CF-0979
	)	1984CF-1003
	)	1984CF-1004
Respondents.	)	1984CF-1046
	)	1984CF-1074
	)	1984CF-1093

JUSTICE NASH delivered the opinion of the court

This case was initiated by a complaint filed with the Illinois Human Rights Commission by the Department of

Human Rights (the Department) on behalf of certain former employees of petitioner, the Babcock & Wilcox Company (B&W). The complaint charged that B&W violated section 2-102(A) of the Illinois Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A)) (Human Rights Act) by maintaining and implementing a severance pay policy which denied severance pay to complainants because they were eligible to retire on pensions, which was alleged to be an impermissible age-related criterion. The Department moved for partial summary judgment before the Commission and B&W sought dismissal of the complaints. B&W now appeals from the order and decision of the Commission which granted the Department's motion for summary judgment, contending that (1) ineligibility for a termination allowance based on immediate eligibility for retirement benefits was not impermissible age discrimination because age was not the differentiating factor and there was no intent of the employer to discriminate because of age; (2) that the challenged action is exempt from the prohibitions of the Human Rights Act because it was taken pursuant to a retirement system that is not used as a subterfuge for and does not have the effect of unlawful discrimination; and, (3) the claims of those complainants who were hourly employees were waived by a contract entered into between B&W and their collective bargaining representatives, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 528 (the Union). We reverse.

The individual complainants each filed charges with the Department alleging that B&W violated the Illinois Human Rights Act when it denied them severance pay on

the ground they were eligible to retire and receive pensions. The Department filed a complaint with the Commission pursuant to section 7-102 of the Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 7-102(F)) which alleged, and B&W's answer admitted, that complainants Roland Berglund, Margaret Dreesen, and John Campbell were each salaried employees of B&W, over the age of 40, with more than 15 years of service with B&W at the time it ceased its Illinois operations on October 31, 1983; the remaining complainants were B&W hourly employees between the ages of 40 and 70 at the time of their separation from B&W's employ and were production workers subject to the terms of a contract entered into on March 22, 1983, between B&W, UAW, and the Union, which provided for a separation allowance to employees meeting the eligibility requirements contained therein. The complaint further alleged that, but for B&W's claimed age-discriminatory-separation allowance policy, and other acts of discrimination, the complainants would have been eligible for a separation allowance.

The Department moved for partial summary judgment and B&W filed an affidavit in opposition to that motion and in support of its cross-motion for summary judgment. While B&W's counteraffidavit is part of the record on appeal, its cross-motion for summary judgment is not. The Department's motion and B&W's counteraffidavit show that in 1963 B&W acquired its Rockford, Illinois, facilities and its operations there were part of its Automated Machine Division (AMD). AMD performed nuclear core structural work and produced automated machines in the Rockford facilities. In the spring of 1981, the nuclear core structural work was transferred from

AMD to another B&W group, and in 1982, the Rockford plant was transferred to Acme Precision Products (Acme), an unaffiliated company. Acme continued the automated machine activities formerly conducted by B&W, employing some former B&W salaried employees associated with the automated machine activities. Litigation respecting B&W's denial of termination benefits to those employees was resolved in *I. Dean Arnold v. Babcock & Wilcox Co.* (1987), 154 Ill. App. 3d 863, 507 N.E.2d 218, *aff'd* (1988), 123 Ill. 2d 67, 525 N.E.2d 59.

B&W subsequently leased space from Acme at the Rockford plant for the purpose of performing its nuclear core structural work and all complainants continued their employment with B&W for that purpose until about October 31, 1983, when B&W ceased its Rockford operation. All of the complainants were denied a termination allowance by B&W.

Hourly Employees

On March 22, 1983, UAW and the Union entered into a contract with B&W on behalf of the hourly employees in contemplation of the plant closing, which provided that an active employee "who is not eligible for a normal, early, special early or disability retirement under the Service Benefit Pension Plan" would be entitled to a separation allowance based on years of service. A minimum of three-years seniority was necessary to be eligible for the allowance, and the agreement provided that the separation allowance would be paid in a lump sum and would not be considered as a payment in lieu of wages.

Generally, any person who was an hourly employee on December 31, 1975, became a member of the Company Service Benefit Pension Plan, and any person becoming an hourly employee thereafter became a member of the plan upon the latter of the date the employee completed one year of continuous service or reached age 25. An employee's membership in the plan ceased upon termination of his employment unless such termination was by reason of retirement. Eligibility for normal, early, and special early retirement was as follows:

> "1. Normal Retirement: a member who is 65 years of age on the retirement date. Benefits equal a specified monthly amount for each year of credited service.
>
> 2. Early Retirement: a member who has at least 15 years of service and is age 55 or older on the retirement. Benefits are computed in accordance with the normal retirement provisions contained in the plan but are reduced by 4/10 of 1% for each month by which the member has not attained age 62 at the time of retirement.
>
> 3. Special Early Retirement: a member who has at least 10 years of service and age 62 or older on the retirement date.
>
> 4. Disability Retirement: a member who has at least 10 years of service and has a permanent and total disability on the retirement date. If the pension commenced prior to age 55, the maximum pension was the equivalent actuarial value to the maximum pension payable at age 55."

All of the hourly employee complainants were ages 55 through 64 except for Thomas Ivy, who was 65 years old,

and, pursuant to the terms of the plant closing agreement, these employees were denied a termination allowance because they were eligible to retire. The collective bargaining agreement which was in effect from March 28, 1980, through October 31, 1983, has no provision for a separation allowance, and neither that contract nor the service benefit pension plan state that an hourly employee who is eligible for a retirement pension will not be eligible for a separation allowance.

Salaried Employees

At the time B&W ceased its Rockford operations, its policy and procedure No. 1414-A1 regarding termination benefits for salaried employees provided that the termination pay awarded was to assist financially those permanently terminated salaried employees during their reemployment adjustment period. Policy and procedure No. 1414-A1 provides that termination allowances were not available if a salaried employee was immediately eligible to retire pursuant to the employee retirement plan (the retirement plan). A salaried employee over 45 years of age was eligible for the termination allowance if he had one or more years of service; all salaried employees with five or more years of service were eligible regardless of age. A copy of policy and procedure No. 1414-A1 was available for employee inspection in the personnel department and had been in effect since at least 1960.

Membership in the salaried employees' retirement plan was generally the same as that under the hourly employees' pension plan and, like that plan, a salaried

employee's membership ended upon termination of employment. Salaried employees were eligible for retirement benefits as follows:

> 1. "Normal Retirement: a member who is 65 years of age on the retirement date. The minimum annual pension payable to a member who has completed 15 or more years of credited service is $1,500; the minimum pension payable to a member with less than 15 years of service is equal to $1,500 multiplied by the ratio that years of credited service bears to 15.
>
> 2. Early Retirement: a member who has at least 15 years of service and age 50 or older on the retirement date. Benefits are computed in accordance with the normal retirement provisions contained in the plan but if the total of the member's age and years of credited service is less than 75, certain reductions in benefits are set forth in the plan.
>
> 3. Disability Retirement: a member who has at least 15 years of service and a permanent and total disability on the retirement date."

The current retirement plan, effective March 1, 1979, did not state that termination allowances would be denied if a salaried employee was eligible for immediate retirement. The summary plan description, dated May 1976, provided, however, that an employee's pension would be reduced by any dismissal allowance, and that "[t]his booklet summarizes only the main features of the Employee Retirement Plan and does not attempt to cover all details. These are provided in the official plan text and Trust Agreement which legally govern the operation of the plan. Copies of these documents * * * are available for review by any plan member at your local personnel office." The retirement plan, effective January 1, 1972, as

well as other prior versions of the retirement plan dating back to 1955, provided that the amount of pension payable to a retired employee would be reduced by the amount of any dismissal allowance paid or payable to a retired or terminated employee.

In summary, the undisputed facts show that B&W denied a termination allowance to those complainants who were salaried employees in accordance with its long-established written company policy and procedure and that those complainants who were hourly employees were denied termination pay as was provided in the plant closing agreement entered into between B&W and the hourly employees' union representatives. Further, the established company retirement plans for both hourly and salaried employees do not state that retirement-eligible employees would be denied termination pay.

The Department moved for partial summary judgment on the issue of liability and B&W apparently filed a cross-motion for summary judgment seeking dismissal of the complaint. Initially, we note that the administrative law judge (ALJ) made inconsistent findings of fact regarding the status of complainants Berglund, Dreesen, and Campbell as salaried or hourly employees. As the Department's complaint and B&W's answer make clear, these are salaried employees, and neither B&W nor the Department dispute this fact on appeal.

The ALJ, in her interim recommended order and decision, concluded that B&W's policy of denying severance pay to employees eligible to retire with a pension resulted in age discrimination prohibited by section 2-102(A) of the Illinois Human Rights Act (Ill. Rev. Stat.

1987, ch. 68, par. 2-102(A)) and that complainants were thus treated disparately from nonpension eligible employees who received the severance pay. The ALJ also concluded that B&W's severance pay policy was not exempt as a merit or retirement system under section 2-104(5)(a) of the Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a)), and that B&W's affirmative defense of waiver was not a defense to the Human Rights Act's prohibition against unlawful discrimination on the basis of age. In concluding that B&W's severance pay policy was not exempt under section 2-104(5)(a) of the Human Rights Act, the ALJ recommended that the Human Rights Commission adopt the rationale of some Federal cases which have interpreted an analogous Federal provision under the Federal Age Discrimination in Employment Act of 1967. (29 U.S.C. §623(f)(2) (1982).) These cases hold that age-based distinctions in employee benefit plans must be justified by significant cost considerations and, because the age of an employee has no relation to the cost of severance pay to an employer, a severance pay policy which denies the award to the older worker is age discriminatory. B&W filed exceptions to the interim recommended order and decision, and the ALJ thereafter entered her recommended order and decision sustaining the complaints.

On June 28, 1988, the Commission entered an order affirming the recommended order and decision, finding that B&W's severance policy was facially discriminatory, and B&W's exceptions were denied. Because the Department does not argue that B&W's failure to file its exceptions to the recommended order and decision waives

those exceptions, we do not consider the issue. *Cf. Glassworks v. Human Rights Comm'n* (1987), 164 Ill. App. 3d 842, 849, 518 N.E.2d 343 (where objections were filed with the ALJ as to the interim recommended order and decision and not to the recommended order and decision as is required under section 8-107(A) of the Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 8-107(A)), the objections were not preserved for review).

On July 8, 1988, B&W filed a motion with the Human Rights Commission to modify its order, alleging that an earlier action entitled *Equal Employment Opportunity Comm'n v. Babcock & Wilcox Co.* (W.D. Mo. filed June 13, 1986), No. 86-0762-CV-W-6, superseded this action insofar as the salaried employees are concerned. The record discloses that in that case, the Federal Equal Employment Opportunity Commission filed a complaint on behalf of certain unnamed salaried employees alleging that B&W had violated the Federal Age Discrimination in Employment Act of 1967 (29 U.S.C. §621 *et seq.* (1982)) by denying those employees a termination allowance. That case was settled by a consent decree entered on December 8, 1987. In its memorandum in support of its motion to modify the Commission's order in this case, B&W argued that upon the commencement of an action under the Federal Age Discrimination Act, any State action is superseded, and that any action on behalf of the salaried employees in this case was accordingly precluded. The Commission and the Department note in their brief that on January 6, 1989, the Commission entered a supplemental order, which is not part of the record of this case on appeal, deleting its order for severance payments to the three complainants who were salaried employees, and that a

motion by the Department to vacate or modify that supplemental order is still pending before the Commission. The Commission and the Department also note in their brief in this court that the Department had filed a brief with the Commission in opposition to B&W's motion to modify its order in December 1988, and state that the brief "was inadvertently not before the Commission at the time of the January, 1989 modification. * * * The State Respondents will inform this Court of any ruling and make a motion to supplement the record, if necessary." This matter has not been noted or addressed in B&W's brief.

On August 1, 1988, B&W filed a petition for review of the Commission's order by this court pursuant to section 8-111 of the Human Rights Act which permits a party to obtain judicial review of a final order of the Commission by filing a petition for review in the appellate court within 35 days after entry the Commission's order. (See Ill. Rev. Stat. 1987, ch. 68, par. 8-111.) The parties have not appealed to this court from the later supplemental order which was apparently entered by the Commission which is stated to have modified the decision relating to the salaried employees and which we are asked to review in this appeal. We note too that B&W has not complied with Supreme Court Rule 341(e)(4)(ii) which requires that an appellant's brief contain a statement of jurisdiction (122 Ill. 2d R. 341(e)(4)(ii)).

We consider first whether the Commission's order affirming the ALJ's recommended order and decision is final and appealable. Section 8-111(A)(1) of the Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 8-111(A)(1)) provides that a petition for review to the appellate court

should be filed in accordance with Supreme Court Rule 335 (107 Ill. 2d R. 335) which makes section 3-101 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 3-101) applicable to a direct review of an administrative order by the appellate court. (107 Ill. 2d R. 335.) Section 3-101 of the Code of Civil Procedure provides:

> " 'Administrative decision' or 'decision' means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency. In all cases in which a statute or a rule of the administrative agency requires or permits an application for a rehearing or other method of administrative review to be filed within a specified time (as distinguished from a statute which permits the application for rehearing or administrative review to be filed at any time before judgment by the administrative agency against the applicant or within a specified time after the entry of such judgment), and an application for such rehearing or review is made, no administrative decision of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied. *However, if the particular statute permits an application for rehearing or other method of administrative review to be filed with the administrative agency for an indefinite period of time after the administrative decision has been rendered* (such as permitting such application to be filed at any time before judgment by the administrative agency against the applicant or within a specified time after the entry of such judgment), *then the authorization for the filing of such application for rehearing or review shall not postpone the time when the administrative decision as to which such application shall be filed would*

otherwise become final, but the filing of the application for rehearing or review with the administrative agency in this type of case shall constitute the commencement of a new proceeding before such agency, and the decision rendered in order to dispose of such rehearing or other review proceeding shall constitute a new and independent administrative decision. If such new and independent decision consists merely of the denial of the application for rehearing or other method of administrative review, the record upon judicial review of such decision shall be limited to the application for rehearing or other review and the order or decision denying such application and shall not include the record of proceedings had before the rendering of the administrative decision as to which the application for rehearing or other administrative review shall have been filed unless the suit for judicial review is commenced within the time in which it would be authorized by this Act to have been commenced if no application for rehearing or other method of administrative review had been filed. On the other hand, if the rehearing or other administrative review is granted by the administrative agency, then the record on judicial review of the resulting administrative decision rendered pursuant to the rehearing or other administrative review may consist not only of the record of proceedings had before the administrative agency in such rehearing or other administrative review proceedings, but also of the record of proceedings had before such administrative agency prior to its rendering of the administrative decision as to which the rehearing or other administrative review shall have been granted." (Emphasis added.) (Ill. Rev. Stat. 1987, ch. 110, par. 3-101.)

The Human Rights Act does contain provisions which regulate applications for rehearing and modification of

the Commission's orders. Section 8-107(F)(1) provides that a party may file an application for a rehearing before the full commission within 30 days after service of the Commission's order. (Ill. Rev. Stat. 1987, ch. 68, par. 8-107(F)(l).) While applications for a rehearing are discouraged, a rehearing will be granted upon a clear demonstration that legal issues of significance are involved or if there is a conflict in decisions of the Human Rights Commission. (Ill. Rev. Stat. 1987, ch. 68, par. 8-107(F)(2).) If an application for rehearing is granted by a vote of six Commission members, the original order is nullified (Ill. Rev. Stat. 1987, ch. 68, pars. 8-107(F)(2), (F)(3)). B&W did not request a rehearing before the full commission, but moved for a modification of the Commission's order because, as B&W alleged, a prior consent decree pertaining to the salaried employees had been entered into between B&W and the Equal Employment Opportunity Commission thereby superseding the salaried employees' claims in this case.

Section 8-107(G)(1) of the Human Rights Act provides that "[a]t any time prior to a final order of the court in a proceeding for judicial review under this Act, the Commission or the three-member panel which decided the matter, upon reasonable notice, may modify or set aside in whole or in part any finding or order made by it in accordance with this Section." (Ill. Rev. Stat. 1987, ch. 68, par. 8-107(G)(1).) Because the Human Rights Act permits the Commission to modify or set aside its order for an indefinite period of time prior to any final order by a reviewing court, the Commission's order entered on June 28, 1988, must be considered as a final order under section 3-101 of the Code of Civil Procedure, even though it

may be modified or, indeed, vacated by the Commission while being reviewed by the appellate or supreme courts.

We recognize that our conclusion that the order is appealable may provide ground for a subsequent mootness argument, as the Commission may have again changed, or vacated, the order we are called upon to review. However, when reviewing a provision under the Fair Employment Practices Act (Ill. Rev. Stat. 1963, ch. 48, par. 858(h)), which is substantially similar to section 8-107(G)(1) of the Human Rights Act, our supreme court stated that "this provision expresses the legislative purpose that judicial review is not to be barred by the power of an administrative agency to reconsider its decision after judicial review has been initiated." (*Motorola, Inc. v. Illinois Fair Employment Practices Comm'n* (1966), 34 Ill. 2d 266, 272, 215 N.E.2d 286, 290.) On addressing the constitutional issue relating to the lack of complete finality of the administrative decision in that case, the court stated that one constitutional issue that might have arisen "is met by section 9 of article VI of the constitution, S.H.A. which provides that the circuit court shall have 'such powers of review of administrative action as may be provided by law.' " (*Motorola, Inc. v. Illinois Fair Employment Practices Comm'n* (1966), 34 Ill. 2d 266, 272-73, 215 N.E.2d 286, 290; see also *Fredman Brothers Furniture Co. v. Department of Revenue* (1985), 109 Ill. 2d 202, 214, 486 N.E.2d 893; *Woodward Governor Co. v. Human Rights Comm'n* (1985), 139 Ill. App. 3d 853, 857-58, 487 N.E.2d 653.) In light of these cases and section 3-101 of the Code of Civil Procedure, we consider that the Commission's order is final for purposes of review, and any supplemental order entered by it in this case is to be considered as a

new and independent decision which has not been appealed and is not before us.

B&W contends first that determining ineligibility for a termination allowance because a former employee is eligible for retirement benefits did not constitute impermissible age discrimination because years of service, and not age, was the determinative factor. B&W also contends that its severance-pay policies are exempt from the prohibitions of the Human Rights Act because the policies are part of a retirement system that is not used as a subterfuge for or does not have the effect of unlawful discrimination. (See Ill. Rev. Stat., 1987, ch. 68, par. 2-104(5)(a).) The Department and Commission argue that because age was a motivating factor in B&W's decision not to pay severance pay to complainants, B&W's severance-pay policies are discriminatory on the basis of age. They also argue that the severance policies in question cannot qualify as an exempt retirement system under section 2-104(5)(a) of the Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a)) or, alternatively, that the policies have the effect of unlawful discrimination because a common element in an exempt retirement plan is the existence of age-related cost factors which are lacking in B&W's severance-pay policies. The argument is that age-based distinctions in retirement systems are permissible only if the cost of providing a benefit increases because of age; thus, because the cost of providing severance pay in the present case does not increase because of the employee's age, B&W's severance-pay policies are not exempt under section 2-104(5)(a) of the Human Rights Act.

We recognize that most Federal authority which has considered a similar Federal statute supports the view of

the Commission and Department. (See *Equal Employment Opportunity Comm'n v. Westinghouse Electric Corp.* (3rd Cir. 1989), 869 F.2d 696, 710; *Equal Employment Opportunity Comm'n v. City of Mt. Lebanon, Pennsylvania* (3rd Cir. 1988), 842 F.2d 1480, 1489; *Karlen v. City Colleges of Chicago* (7th Cir. 1988), 837 F.2d 314, 319; *Cipriano v. Board of Education of the City School District of the City of North Tonawanda, New York* (2d Cir. 1986), 785 F.2d 51, 57-58; *Equal Employment Opportunity v. Babcock & Wilcox Co.* (E.D. N.C. 1987), 43 F.E.P. Cases 736, 742.) However, after oral arguments in this case, the United States Supreme Court decided *Public Employees Retirement System of Ohio v. Betts*, (1989), 492 U.S. ___, 106 L. Ed. 2d 134, 109 S. Ct. 2854), and there considered provisions of the Age Discrimination in Employment Act of 1967 (Age Discrimination Act) (29 U.S.C. §621 *et seq.* (1982)), which are comparable to those of the Illinois Human Rights Act which are the subject of the present appeal. Because most of the decisions in the cases cited by the parties in their briefs are contrary to the holding and reasoning in *Betts*, and we find *Betts* controlling in this case, our analysis will be essentially limited to consideration of *Betts* and the application of its reasoning to this case.

A proper resolution of the parties arguments requires us to first consider whether the Federal Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §1001 *et seq.*) preempts the Illinois Human Rights Act insofar as it may vary from the Federal Age Discrimination in Employment Act of 1967, which we do so conclude. ERISA preempts "any and all State laws insofar as they * * * relate to an employee benefit plan." (29 U.S.C. §1144(a) (1982).) An employee benefit plan includes an

employee welfare benefit plan (29 U.S.C. §1002(3) (1982)) which is "any plan, fund, or program * * * established or maintained by an employer or by an employee organization, or by both." (29 U.S.C. 1002(1) (1982).) An employee welfare benefit plan which pays severance benefits out of an employer's general assets as well as a trust fund is governed by ERISA. (*Fort Halifax Packing Co. v. Coyne* (1987), 482 U.S. 1, 7 n.5, 96 L. Ed. 2d 1, 8 n.5, 107 S. Ct. 2211, 2215 n.5.) "State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." (29 U.S.C. §1144(c) (1982).) State decisional law relating to an employee benefit plan is also superseded. *Gadsby v. Health Insurance Administration, Inc.* (1988), 168 Ill. App. 3d 460, 466, 522 N.E.2d 865.

A law "relates to" an employee benefit plan if it has a connection with or reference to such a plan. (*Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 96-97, 77 L. Ed. 2d 490, 501, 103 S. Ct. 2890, 2899-2900.) In enacting ERISA, Congress did not limit the preemptive effect of ERISA to specific subject matters covered by it which deal with reporting, disclosure, and fiduciary responsibilities. (*Shaw*, 463 U.S. at 98, 77 L. Ed. 2d at 501-02, 103 S. Ct. at 2900.) Instead, Congress intended to eliminate all "conflicting or inconsistent State and local regulation of employee benefit plans." (*Shaw*, 463 U.S. at 99, 77 L. Ed. 2d at 502, 103 S. Ct. at 2901, *quoting* 120 Cong. Rec. 29933 (1974).) The *Shaw* Court noted Congress' desire to achieve national uniformity with respect to employee benefit plans through ERISA preemption. *Shaw*, 463 U.S. at 99 n.20, 77 L. Ed. 2d at 502-03 n.20, 103 S. Ct. at 2901 n.20.

Here, we conclude that B & W's severance-pay policies are employee welfare benefit plans within the meaning of ERISA. Regarding the salaried complainants in this case, the Illinois Supreme Court has considered B & W's policy and procedure No. 1414-A1 with which we are concerned in this case and concluded that it was an employee welfare benefit plan within the meaning of ERISA. *Arnold v. Babcock & Wilcox Co.* (1988), 123 Ill. 2d 67, 72, 525 N.E.2d 59.

The severance-pay provision in the plant closing agreement executed on behalf of the hourly complainants presents a more difficult question. ERISA preempts State laws which relate to employee benefit plans (29 U.S.C. §1144(a) (1982)), not merely those State laws relating to employee benefits. (*Fort Halifax Packing Co. v. Coyne* (1987), 482 U.S. 1, 7, 96 L. Ed. 2d 1, 9, 107 S. Ct. 2211, 2215-16.) Superficially, *Fort Halifax Packing Co.* appears to apply here. In that case, the defendant closed down its Maine operations but denied the plaintiffs severance pay. Maine had adopted a statute which required employers that terminated their plant operations to pay severance benefits to their terminated employees. The Maine Supreme Judicial Court held that the statute was not preempted by ERISA because ERISA only preempted benefit plans created by employers. Accordingly, the Maine Judicial Supreme Court found that because the severance-pay liability in that case arose from operation of a State statute, the plaintiffs claim for severance pay was not preempted by ERISA. *Fort Halifax Packing Co.*, 482 U.S. at 4-6, 96 L. Ed. 2d at 7-8, 107 S. Ct. at 2214-15.

While the United States Supreme Court held that the Maine statute was not preempted by ERISA, it disagreed with the State court's rationale. The United States Supreme Court concluded that ERISA did not preempt the statute because it "neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under that federal statute [ERISA]." (*Fort Halifax Packing Co.*, 482 U.S. at 6, 96 L. Ed 2d at 8, 107 S. Ct. at 2215.) The Court stated that in enacting ERISA, Congress intended to provide employers with a uniform set of administrative procedures governed by one set of regulations. Congress' concern for uniformity in the regulation of employee benefit plans "only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." (*Fort Halifax Packing Co.*, 482 U.S. at 11, 96 L. Ed. 2d at 11, 107 S. Ct. at 2217.) The requirement of a one-time, lump-sum payment triggered by a plant closing requires no administrative scheme at all. (*Fort Halifax Packing Co.*, 482 U.S. at 12, 96 L. Ed. 2d at 12, 107 S. Ct. at 2218.) The Court noted that the defendant had no need to set up an administrative scheme in response to the Maine statute. (*Fort Halifax Packing Co.*, 482 U.S. at 14, 96 L. Ed. 2d at 13, 107 S. Ct. at 2219.) "The obligation imposed by Maine generates no such [administrative] activity. There is no occasion to determine whether a 'plan' is 'operated' in the interest of its beneficiaries, because nothing is 'operated.' " *Fort Halifax Packing Co.*, 482 U.S. at 16, 96 L. Ed. 2d at 14, 107 S. Ct. at 2220.

We find the facts in the present case to be distinguishable. In our view, the hourly complainants in this case were entitled to severance benefits pursuant to an

employee welfare benefit plan when B&W entered into its contract with UAW and the Union to provide such benefits. Unlike the facts in *Fort Halifax Packing Co.*, B&W did establish, maintain, and operate an employee welfare benefit plan relating to severance benefits, albeit in anticipation of its plant closure. In *Fort Halifax Packing Co.*, only a Maine statute was involved and did not require employers to design an administrative scheme for payment of severance benefits. Accordingly, we do not find that case controlling, and we conclude that B & W's agreement to pay severance benefits to hourly employees is subject to ERISA.

While ERISA preempts State laws which relate to employee benefit plans (29 U.S.C. 1144(a) (1982)), it does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulations issued under any such law" (29 U.S.C. 1144(d) (1982)). In *Shaw v. Delta Air Lines. Inc.* (1983), 463 U.S. 85, 77 L. Ed. 2d 490, 103 S. Ct. 2890, the United States Supreme Court analyzed the relationship between ERISA, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended (Title VII) (42 U.S.C. §2000e *et seq.)*, and a State law prohibiting discrimination in employee benefit plans on the basis of sex. Based on a New York human rights law, the State court held that a private employer's employee benefit plan which treated pregnancy differently from other nonoccupational disabilities had engaged in sex discrimination. However, shortly before the State court decision, the United States Supreme Court ruled that discrimination on the basis of pregnancy was not sex discrimination under Title VII. *Shaw*, 463 U.S. at 88, 77 L. Ed. 2d at 495-96, 103 S. Ct. at 2895.

The Court held that the State law was preempted by ERISA insofar as it prohibited practices which were not unlawful under Federal law. (*Shaw*, 463 U.S. at 108, 77 L. Ed. 2d at 508, 103 S. Ct. at 2906.) While preemption of a State law which sought to enforce Title VII's commands would impair Title VII, State laws that are lawful under Title VII would not impair it. (*Shaw*, 463 U.S. at 101-03, 77 L. Ed. 2d at 503-05, 103 S. Ct. at 2902-03.) The Court noted that it "fail[ed] to see how federal law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted." *Shaw*, 463 U.S. at 103-04, 77 L. Ed. 2d at 505, 103 S. Ct. at 2903.

The Court rejected the "double saving clause" argument, that is, because ERISA does not preempt Title VII and Title VII does not preempt State fair employment laws, ERISA does not preempt such State laws. "Title VII does not transform state fair employment laws into federal laws that §514(d) [29 U.S.C. 1144(d)] saves from ERISA pre-emption." (*Shaw*, 463 U.S. at 101 n.22, 77 L. Ed. 2d at 503 n.22, 103 S. Ct. at 2902 n.22.) The Court also rejected the argument that preemption of the State's law would impair Title VII because that law encourages States to adopt laws providing greater substantive protection, noting that "[w]e have found no statutory language or legislative history suggesting that the federal interest in State fair employment laws extends any farther than saving such laws from pre-emption by Title VII itself." *Shaw*, 463 U.S. at 103 n.24, 77 L. Ed. 2d at 505 n.24, 103 S. Ct. at 2903 n.24.

While the Age Discrimination Act permits States to perform like functions with regard to discriminatory employment practices because of age (29 U.S.C. §633 (1982)),

we have found no authority, legislative or otherwise, which would permit us to conclude that ERISA's broad preemption provision extends any further than saving State laws which advance the Federal interest in prohibiting age discrimination in employment. In fact, with the exception of a statutory waiting period, the Age Discrimination Act permits concurrent State and Federal administrative jurisdiction to expedite the resolution of age discrimination claims. (*Ocsar Mayer & Co. v. Evans* (1979), 441 U.S. 750, 757, 60 L. Ed. 2d 609, 616, 99 S. Ct. 2066.) State laws which were inconsistent with the Age Discrimination Act would, accordingly, cause simultaneous, inconsistent age discrimination claims.

From the forgoing, we conclude that the age discrimination claims in this case under sections 2-102(A) and 2-104(5)(a) of the Illinois Human Rights Act are preempted by ERISA to the extent the Illinois Human Rights Act differs from the Federal Age Discrimination in Employment Act of 1967. We next consider the substantive provisions of the Human Rights Act and the Age Discrimination Act as they relate to this case.

It is a civil violation under the Illinois Human Rights Act "[f]or any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination." (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A).) The Human Rights Act defines "unlawful discrimination," in part, as discrimination against a person because of age. (Ill. Rev. Stat. 1987, ch. 68, par. 1-103(Q).) "Age" is

defined, to the extent pertinent here, as "the chronological age of a person who is at least 40 years old." (Ill. Rev. Stat. 1987, ch. 68, par. 1-103(A).) Thus, only persons who are at least 40 years of age are in the protected class. There is no dispute that the claimants here are in the protected class or that B&W is an employer as defined in the Human Rights Act. The Human Rights Act also provides that an employer is not prohibited from "[a]pplying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination." Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a).

The similar Federal Age Discrimination in Employment Act of 1967 (29 U.S.C. §621 *et seq.* (1982)) provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." (29 U.S.C. §623 (1982).) Persons in the protected class also must be at least 40 years of age. (29 U.C.S. §631(b) (19___).) As does the Illinois Human Rights Act, the Age Discrimination Act provides that it is not unlawful for an employer to observe the terms of a "bona fide employee benefit plan such as a retirement * * * plan, which is not a subterfuge to evade the purpose of this chapter." (29 U.S.C. §623(f)(2) (1982).) Because of the close similarities between the Age Discrimination Act and the Human Rights Act, and our conclusion that we are constrained in our interpretation of the Human Rights Act by ERISA and the

Age Discrimination Act, we consider *Betts* controlling authority in resolving the issues raised in this petition for review.

In *Betts*, the retirement system adopted for employees of the State of Ohio provided for two types of retirement benefits. An employee was eligible for an age-and-service retirement benefit if at least 60 years of age with five years of service credit; if at least 55 years of age with 25 years of service credit; or, if the employee had 30 years of service credit. Disability retirement benefits were available to employees with at least five years of service, but only if the employee was under the age of 60 at the time of retirement. At the time of her retirement, the plaintiff in *Betts* was denied disability retirement benefits as she was 61 years old. The plaintiff's age-and-service retirement benefits under the State plan were $158.50 per month but, had she been permitted a disability retirement benefit, she would have received $355 per month. (*Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 144-46, 109 S. Ct. at 2858-59.) The Court concluded that the plaintiff did not establish that the defendant discriminated against her because of age in these circumstances.

Initially, the Supreme Court considered an administrative regulation of the Equal Employment Opportunity Commission which provided that an employee benefit plan which had age-based distinctions would not be considered a subterfuge to evade the purposes of the Age Discrimination Act if age-based reductions in benefits were justified by significant cost considerations. The Court rejected the EEOC's cost-justification rationale because " 'subterfuge' means 'a scheme, plan, stratagem, or artifice of evasion,' which in the context of section 4(f)(2)

[29 U.S.C. §623(f)(2)], connotes a specific 'intent * * * to evade a statutory requirement.' [Citation.] The term thus includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge." (*Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 150, 109 S. Ct. at 2863.) Furthermore, the cost-justification requirement appeared nowhere in the Age Discrimination Act but originated from an interpretive regulation promulgated by the Department of Labor, and that regulation did not intend to exclude from section 4(f)(2) exemption plans which could not meet a cost-justification requirement. The regulation was only intended as a safe harbor, that is, "a nonexclusive test for employers to use in determining whether they could be certain of qualifying for the section 4(f)(2) exemption." *Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 150-51, 109 S. Ct. at 2863.

We too conclude that an employer need not meet a cost-justification requirement to be eligible for the exemption under section 2-104(5)(a) of the Human Rights Act, and reject the contrary conclusion of the administrative law judge and commission in the present case. Like the Federal statute, the Human Rights Act does not mandate such a rule. Further support for our conclusion is the fact that an employer's costs which are associated with providing retirement benefits do not always increase with age. *Betts*, 492 U.S. at ___ n.5, 106 L. Ed. 2d at 152 n.5, 109 S. Ct. at 2864 n.5 (in a defined contribution plan an employer's contribution is fixed and an employee will receive a level of benefits dependent on the amount contributed; thus, an employer's cost for making contributions is totally unrelated to an employee's age).

After finding that an exemption for a *bona fide* retirement plan under the Age Discrimination Act did not require an employer to meet a cost-justification requirement, the United States Supreme Court in *Betts* stated that to determine the meaning of the term "subterfuge" in the context of section 4(f)(2) of the Age Discrimination Act, a court must look to the purposes and substantive provisions of that statute. (*Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 153-54, 109 S. Ct. at 2865-66.) The Federal Age Discrimination Act promotes the employment of older persons based upon their ability rather than age. It is designed to preclude employment discrimination because of age, and enables employers and employees to resolve problems arising from the impact of age on employment. *Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 153, 109 S. Ct. at 2865.) The Age Discrimination Act's primary enforcement provision prohibits an employer from failing or refusing to hire, or discharging a person, or discriminating against him, with respect to compensation, terms conditions, or privileges of employment, on the basis of age. (*Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 154, 109 S. Ct. at 2866.) The Court stated that:

> "The phrase 'compensation, terms, conditions, or privileges of employment' in section 4(a)(1) [29 U.S.C. §623(a)] can be read to encompass employee benefit plans of the type covered by section 4(f)(2). Such an interpretation, however, would in effect render the section 4(f)(2) exemption nugatory with respect to post-Act plans. Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in section 4(a)(1) and, therefore, with the purposes of the Act itself. It is difficult to see how a plan provision that expressly mandates disparate

> treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes * * * ." (*Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 154, 109 S. Ct. at 2866.)

Accordingly, the Supreme Court held that "when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some *nonfringe-benefit aspect of the employment relation.*" (Emphasis added.) (*Betts*, 492 U. S . at ___, 106 L. Ed. 2d at 157, 109 S. Ct . at 2868.) While age-based reductions in benefits would generally be justified by any increased costs generated because of an employee's age, an employer could not decrease the wages of all workers and then increase benefits only for younger workers because the employer's action would be viewed as a subterfuge for age discrimination. Under section 4(d) of the Age Discrimination Act (29 U.S.C. §623(d) (1982)), it is unlawful for an employer to discriminate against an employee who has opposed an employer practice prohibited by the Age Discrimination Act or who has participated in age discrimination-related litigation and, if an employer did so, the employer's action would be a subterfuge for unlawful age discrimination. *Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 156, 109 S. Ct. at 2867-68.

Given the similarities between the Age Discrimination Act and the Human Rights Act, and the Human Rights Act's similar purpose of encouraging the employment of older workers (*Board of Trustees of Community College District No. 508 v. Human Rights Comm'n* (1981), 88

Ill. 2d 22, 32, 429 N.E.2d 1207), we conclude that a retirement system in Illinois may be considered as a subterfuge for unlawful age discrimination only if the employee proves that the system was intended to discriminate in a nonfringe benefit aspect of the employment relation, which was not shown here.

We next consider whether B&W's decision not to pay severance pay to those employees who were eligible to receive retirement pension benefits was pursuant to a retirement system and, if so, whether that system had the effect of unlawful discrimination within the meaning of section 2-104(5)(a) of the Human Rights Act (see Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a)). We believe that the phrase "retirement system" must be construed here in light of the special circumstances which exist in a plant closure case. To "retire" generally means "[t]o terminate employment or service upon reaching retirement age." (Black's Law Dictionary 1183 (5th ed. 1979).) A "system" is an "[o]rderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to some rational principle." (Black's Law Dictionary 1300 (5th ed. 1979).) B&W's severance-pay policies were undoubtedly part of a "system" in that it sought to provide a source of income to all employees upon termination of its Rockford, Illinois, operation. The more difficult question is whether that system may be considered as a "retirement system" under section 2-104(5)(a).

It is apparent that these complainants did not retire in the conventional sense of the word; they were in fact terminated from B&W's employ not because of their age but because B&W ceased its operations in Rockford,

Illinois. But, both complainants and the other employees who did receive severance benefits were retired in the sense that both groups of employees were terminated from B&W's employ. In our view, B&W's severance policies on its closure constituted a "retirement system" as they were designed to achieve the same result as would a traditional retirement system in the ordinary sense of that term, that is, B&W's severance policies, like a retirement plan, ensured that its employees receive a source of income upon termination from their employment. B&W's retirement policies did not have the effect of unlawful discrimination as all terminated employees received compensation from B&W by means of an age-neutral employer action. Furthermore, there is no evidence that B&W's retirement system was intended to discriminate in a non-fringe aspect of the complainants' employment relation with B&W.

Because of our disposition of this issue, we need not consider B&W's further contention that the claims of those complainants who were hourly employees were waived by the contract entered into on March 22, 1983, between B&W, UAW and the Union.

The summary judgment of the Human Rights Commission is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

WOODWARD, J., concurs.

JUSTICE LINDBERG, dissenting:

I believe a "best-case scenario" for the complainants serves to establish that the severance-pay plan discriminates on the basis of age and, therefore, is facially age discriminatory. Assume that two employees each had 15 years' service with B&W on October 31, 1983, but one was 54 years old and the other 55 years old or older on that date. Under the plan the 54-year-old would receive about $3,000 in severance pay, and within the following year he would begin receiving his pension benefits. The 55-year-old, only because of his age, would receive no severance pay and would receive only his pension benefits. Because of his age on October 31, 1983, the 55-year-old has been denied about $3,000 in severance pay. This scenario establishes that B&W's severance-pay plan is facially age discriminatory.

The Illinois Human Rights Act provides:

> "§1-102. Declaration of Policy. It is the public policy of this State:
>
> (A) To secure for all individuals within Illinois the freedom from discrimination because of * * * age * * * in connection with employment * * * ." (Ill. Rev. Stat. 1987, ch. 68, par. 1-102(A).

And:

> "(Q) Unlawful Discrimination. 'Unlawful discrimination' means discrimination against a person because of his or her * * * age * * * ." (Ill. Rev. Stat. 1987, ch. 68, par. 1-102(Q).)

And:

> "§2-102. Civil Rights Violations – Employment. It is a civil rights violation:

> (A) Employers: For any employer * * * to act with respect to * * * discharge * * * tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination." (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A).)

And:

> "§2-104 Exemptions. Nothing contained in this Act shall prohibit:
>
> an employer * * * from:
>
> * * *
>
> (5) Merit and Retirement Systems. (a) Applying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination." Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a).

This statutory scheme makes it clear that in Illinois it is a civil rights violation for an employer to unlawfully discriminate against its employees, and age discrimination constitutes unlawful discrimination. However, an employer may apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a (1) merit or (2) retirement system provided that the system or its administration is not used as (3) a subterfuge for or (4) does not have the effect of unlawful discrimination which, by definition, is discrimination on the basis of age.

The precise question is whether an employer can establish under the exemption provision of section 2-104(5)(a) of the Illinois Human Rights Act (HRA) a

plant closing severance-pay plan which denies severance pay to employees whose age within three length-of-service categories qualifies them to receive their pension benefits. As to Illinois, it would appear we are writing on a clean slate.

I have charted B&W's severance-pay plan for convenience of analysis as follows:

B & W Severance-pay Plan

Length of Service Categories:

I. 15 years or more service:

(a) Employees under age 55 receive *both* the severance pay and their pension (at 55).

(b) Employees *over* age 55 receive no severance pay but *only* their pension.

II. 10 years but not more than 15 years of service:

(a) Employees under age 62 receive *both* the severance pay and their pension (at 62).

(b) Employees age 62 receive no severance pay but *only* their pension.

III. Minimum but not more than 10 years service:

(a) Employees under age 65 receive *both* severance pay and their pension (at 65).

(b) Employees age 65 or older receive no severance pay but *only* their pension.

I conclude that the severance-pay plan does not qualify for exemption under section 2-104(5)(a) of the HRA (Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a)), because it is not a merit or a retirement plan. Even if it could be

construed as a merit or a retirement plan, nonetheless, it has the effect of discriminating on the basis of age. See Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a).

The HRA does not define "merit plan," but it would not be unreasonable to assume that any plan with differentials in pay, hours and other terms of employment based upon quality of performance and/or length of service or other considerations would satisfy the definition of "merit plan." Here severance pay is being *denied* on the basis of merit in terms of length of service. Fifty-five- to 61-one-year-olds with *15 years' service or more,* for example, *are denied* severance pay while 55- to 61-year-olds with *less than 15 years* of service *are given* the severance pay at issue. This phenomenon persists as to each of the three categories of length of service and, thus, disqualifies the severance-pay plan as a "merit plan."

"Retirement plan," while not defined in the HRA, however is defined as "a systematic arrangement established by an employer for guaranteeing an income to employees upon retirement [withdrawal from active service] according to definitely established rules with or without employee contributions but usu. funded." (Webster's Third New International Dictionary, 1939 (1986).) "Income" is defined as "a gain or recurrent benefit that is usu. measured in money and for a given period of time, derives from capital, labor or a combination of both." (Webster's Third New International Dictionary, 1143 (1986).) While the severance-pay plan is a guarantee for withdrawal from service, it is not "income" in that it is not a gain or recurrent benefit for a given period of time. In fact, it is a one-time, lump-sum award of money and

does not satisfy either the dictionary definition of a retirement plan, or the general notion of what constitutes a retirement plan such as the one already in place at B&W.

Regardless, even if the severance-pay plan were to be viewed as one based upon length-of-service merit or retirement, it has the precise effect of discriminating as to age within each of the three length-of-service categories. As such, the severance-pay plan fails to meet the section 2-104(5)(a) exemption of the HRA, and, therefore, it constitutes unlawful discrimination and a civil rights violation under the HRA. Ill. Rev. Stat. 1987, ch. 68, pars. 1-102(A), (Q), 2-102(A).

Obviously, I do not agree with the majority's reliance on *Public Employees Retirement System of Ohio v. Betts* (1989), 492 U.S.___, 106 L. Ed. 2d 134, 109 S. Ct. 2854. The United States Supreme Court held that the retired employee in that case, *Betts*, did not establish a *prima facie* case of age discrimination. The Court relied heavily on its analysis of Congressional debate to ascertain the legislative intent behind the ADEA and in arriving at its final conclusion. The Court found that Congress intended not to regulate retirement programs, which were not a mere subterfuge to implement age-discriminatory practices, when it enacted the ADEA. *Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 155-56, 109 S. Ct. at 2867.

The *Betts* Court decided that the "30% floor" for disability benefits, which were not available to persons who had attained age 60, was part of Ohio's State-retirement plan and, therefore, did not qualify as a *nonfringe benefit* subject to the ADEA age-discrimination prohibitions. (*Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 157, 109 S. Ct.

2868.) The Supreme Court said that *Betts* failed to prove that the discriminatory plan provision was intended to serve the purpose of discriminating in some *nonfringe-benefit* aspect of the employment relationship under the Federal Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §621 *et seq.* (1982)). *Betts*, 492 U.S. at ___, 106 L. Ed. 2d at 157, 109 S. Ct. 2868.

In Illinois, the legislative intent in enacting our statute was quite different. Section 1-102(A) of the HRA, quoted previously, expresses the legislative intent of the HRA which is to secure for all individuals within Illinois freedom from discrimination in employment because of age. (Ill. Rev. Stat. 1987, ch. 68, par. 1-102(A).) In fact, in one of the few cases involving the HRA to come before the final arbiter of Illinois statutes, the Illinois Supreme Court, the court held that the HRA does regulate retirement plans (*Board of Trustees v. Human Rights Comm'n* (1981), 88 Ill. 2d 22, 26, 429 N.E.2d 1207, 1210) in contrast to the *Betts* Court's conclusion that the ADEA does not regulate retirement plans unless they are a subterfuge. While I do not premise my conclusion that B&W's severance-pay plan is age discriminatory on the fact of the HRA's coverage of retirement plans, the distinction between the two acts is, nonetheless, apparent. Additionally, while the ADEA and the HRA both incorporate the subterfuge standard, the HRA has the additional standard of "does not have the effect of unlawful discrimination." (Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a).) Therefore, I conclude that the *Betts* decision is not persuasive in the resolution of the instant petition for review.

After submitting my draft dissent to the majority, it undertook further analysis and included a more detailed

reliance on the Federal Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §1001 *et seq.* (1982)) and a discussion of *Fort Halifax Packing Co. v. Coyne* (1987), 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211. Regrettably, I conclude that the majority in the instant case is incorrect when it concludes that the facts of *Fort Halifax* are distinguishable from those in the instant case. The sole basis for the instant majority's distinction would appear to be that because the hourly employee's union agreed to the severance-pay plan "B&W did establish, maintain and operate an employee welfare benefit plan relating to severance benefits, albeit, in anticipation of plant closure." (*Babcock & Wilcox Co. v. Illinois Human Rights Comm'n*, (2d Dist. 1989), No. 2-88-0735, slip op. at 22.) I could not disagree more. The action of the union is irrelevant. What could be less of a "plan" to "operate," to paraphrase the Court in *Fort Halifax*, than disbursing a one-time lump sum severance payment. The Court in *Fort Halifax* said:

> "The Maine statute neither establishes, nor requires an employer to maintain, an employee benefit *plan*. The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme ever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. The employer may well *never* have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that

duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility. The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for Processing claims and paying benefits.

* * *

The foregoing makes clear both why ERISA is concerned with regulating benefit 'plans,' and why the Maine statute does not establish one. Only 'plans' involve administrative activity potentially subject to employer abuse. The obligation imposed by Maine generates no such activity. There is no occasion to determine whether a 'plan' is 'operated' in the interest of its beneficiaries, because nothing is 'operated.' No financial transactions take place that would be listed in an annual report, and no further information regarding the terms of the severance pay obligation is needed because the statute itself makes these terms clear. It would make no sense for pre-emption to clear the way for exclusive federal regulation, for there would be nothing to regulate. Under such circumstances, pre-emption would in no way serve the over-all purpose of ERISA." (Emphasis in original.) (*Fort Halifax Packing Co.*, 482 U.S. at 12, 14, 96 L. Ed. 2d at 11-12, 14, 107 S. Ct. at 2218, 2220.)

It would be hard to draft a more accurate description of the character of B&W's severance-pay plan. On the basis of the United States Supreme Court's rationale in *Fort Halifax*, B&W's severance-pay plan does not qualify as a plan regulated by ERISA, and, therefore, the application

of the Illinois Human Rights Act is not preempted by ERISA.

I believe that the decision of the Illinois Human Rights Commission, finding that B&W's severance-pay plan discriminated on the basis of age and thereby violated the HRA, was correct. I would affirm.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	CHARGE NO:
THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS, ET AL.	)	1984CF9003
	)	1984CF0766
	)	1984CF0792
	)	1984CF0962
	)	1984CF0969
Complainant,	)	1984CF0970
	)	1984CF0971
	)	1984CF0972
AND	)	1984CF0974
	)	1984CF0975
BABCOCK & WILCOX, INC.	)	1984CF0976
	)	1984CF0978
Respondent,	)	1984CF0979
	)	1984CF1003
	)	1984CF1004
	)	1984CF1046
	)	1984CF1074
	)	1984CF1093
	)	
	)	EEOC NO:
	)	ALS NO: 1531

ORDER AND DECISION

This matter is before the Commission panel to Review the Recommended Order and Decision submitted by Administrative Law Judge Patricia A. Patton. The individual Complainants argue that they were denied severance benefits because of their age in violation of the Human Rights Act. The Respondent contends it did not discriminate against the Complainants because of their age. It further contends, in the alternative, that if there was discrimination, it was exempt from coverage pursuant to Section 2-104(E)(1) of the Act, which, under

certain circumstances, allows discrimination pursuant to a "retirement system".

Cross motions for summary judgment were filed by all the parties. With respect to the sixteen individual Complainants named in the style of this case the Administrative Law Judge found that there was no material issue of fact. Accordingly, she rendered a final recommendation with respect to these Complainants. The charges of the remaining Complainants were severed by Judge Patton, and are not before the panel for review at this time.

I. THE RECOMMENDED ORDER AND DECISION

A. BACKGROUND FACTS

Before presenting her analysis of the case, Chief Judge Patton made thirty-six findings of fact. These findings formed the factual basis for her decision. There does not appear to be any dispute with respect to these factual findings and accordingly they will be adopted by the Commission. Only facts which are necessary to an understanding of the opinion which follows are repeated here. The mere fact that a particular factual finding is not repeated should not be taken as an indication that it was not considered and relied upon by the Commission.

The Complainants in this case were production workers for the Respondent and were subject to the terms of the Collective Bargaining Agreement entered into between the Respondent and the Complainants' union. At some point the Respondent made a decision to cease all operations in Illinois. The Respondent and the Complainants' union entered into negotiations with respect to the

circumstances under which the Illinois workers' employment with the Respondent would be terminated.

On March 22, 1983 the Respondent and the Complainants' union entered into a Memorandum of Agreement, which provided, in relevant part, as follows:

> 1. The Contract will be terminated on October 31, 1983.
>
> 2. Notwithstanding the provisions of the Contract, any employee released from the Plant by the Company on or after the date of this MEMORANDUM OF AGREEMENT and during the terms of this contract, as specified in Section one above whose release would otherwise have been characterized as a lay off from the plant shall be deemed to have been terminated on account of cessation of Company operations and his employment, service and seniority terminated for all purposes with the Company. . . .
>
> 3. Any employee so terminated, as provided in Section 2 above, who was actively employed on the date of this MEMORANDUM OF AGREEMENT and only said date (this excludes any person who may be recalled from lay off status or newly hired subsequent to the date of this MEMORANDUM OF AGREEMENT, *and who is not eligible for a normal, early, special early or disability retirement* under the Service Benefit Pension Plan (Rockford Works) and who executes and delivers to the Company, within seven (7) calendar days following the day of termination, the attached form shall receive the following separation allowance:

SENIORITY AT TERMINATION	WEEKS ALLOWANCE
3 yrs. but less than 5 yrs.	4
5 yrs. but less than 7 yrs.	6
7 yrs. but less than 10 yrs.	7
10 yrs. and over	8

(emphasis added)

The Collective Bargaining Agreement defined "normal retirement date" as the first day of the month coinciding with or next following the date upon which a member attained his or her 65th birthday. The pension plan provided that a member who had completed 15 or more full years of continuous service and had attained age 55 could retire on an early retirement date. Special early retirement was available to members who had completed 10 or more full years of continuous service and who had attained 62 years of age.

The Complainants in this case were all excluded from receiving any sort of separation benefit pursuant to the memorandum of agreement because they were eligible to receive some sort of retirement under the pension plan. Since age is a factor which is considered in determining whether an individual is eligible for retirement, the Complainants contended in front of the Administrative Law Judge that they were excluded from participating in the separation benefit program because of their age.

B. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that the agreement in question constituted a discrimination

based upon *age*. Although the memorandum of agreement does not explicitly refer to age, it indisputably creates a system in which age is a criterion in determining who does and who does not receive termination allowances. Interim Recommended Order and Decision, p. 19. Because attainment of a particular age, in this case 55, is a necessary condition for denial of severance pay, it is Judge Patton's conclusion that the Complainants were denied the severance payments involved in this case because of their age.

The Recommended Order and Decision goes on to reject arguments made by the Respondent based upon the doctrines of waiver and pre-emption. Finally, the Administrative Law Judge found that the discrimination in question was not covered by the exemption contained in Section 2-104(A)(5) of the Human Rights Act.

II. THE RESPONDENT'S EXCEPTIONS

The Respondent first argues that the discrimination involved is not based upon "age". Although eligibility for retirement is clearly based upon the Complainants age, it is also based upon the individual's length of service. In other words, no individual under 55 years of age is eligible for retirement, but the mere fact that an individual has reached age 55 does not entitle that individual to early retirement benefits. As noted above, the individual must be 55 years of age *and* have completed fifteen or more full years of continuous service.

The Respondent cites in support of its argument the case of *General Electric Company v. Gilbert*, 429 U.S. 125 (1976). In that case the United States Supreme Court

stated that discrimination on the basis of pregnancy was not the same as discrimination on the basis of sex. Although only females can become pregnant, not all females become pregnant. Thus, a discrimination against pregnant employees was not the same as a discrimination against women.

The problem with the Respondent's argument is that almost immediately after the *General Electric v. Gilbert* decision Congress enacted an amendment to the law in question which specifically provided that discrimination on the basis of pregnancy was discrimination on the basis of gender. This legislative reversal of the *General Electric v. Gilbert* decision indicates that the United States Supreme Court had not correctly interpreted the law in question, which was Title VII of the Civil Rights Act of 1964.

The Supreme Court, itself, acknowledged this in the case of *Newport News Ship Building and Dry Dock Company v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622 (1983). In that case the Supreme Court stated that Congress, by enacting the amendment not only overturned the holding of *General Electric v. Gilbert*, but also rejected the reasoning employed in that case, that differential treatment of pregnancy is not gender-based discrimination.

Thus, the doctrine enunciated by the Supreme Court in *General Electric v. Gilbert* has been completely discredited. It is crystal clear that the Complainants in this case would have received benefits if they were younger. This is obviously discrimination based upon age, and thus the Respondent's exception must be denied.

The Respondent next argues that it had no intent to discriminate based upon age. For the reasons stated below, this argument is rejected. As can be seen from the discussion of the Respondent's first exception, the memorandum of agreement is not facially neutral. It discriminates on the basis of eligibility for retirement, and eligibility for retirement is determined, at least in part, based on the participant's age. Thus, the agreement in question is, per se, discriminatory. Because the Respondent "intended" to implement this plan, we must find that it "intended" to discriminate on the basis of age.

This is not to say that the Respondent intended to violate the Human Rights Act, or that the Respondent harbored animosity towards the workers. It is clear that the Respondent negotiated the memorandum of agreement in good faith. It is also clear, however, that the memorandum discriminates on the basis of age and that the Respondent "intended" the natural and probable consequences of the agreement. Accordingly, the Respondent's second exception must be denied.

The Respondent next argues that a disparate impact analysis is not applicable to this case. The United States Supreme Court has ruled that a facially neutral test or criterion will violate Federal anti-discrimination law if it has the "effect" of classifying individuals based upon their race, sex, religion, or some other prohibited factor. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). Although cases interpreting Federal law are not binding on the Human Rights Commission, they will be considered by the Commission and State courts in deciding cases under the Human Rights Act. *City of Cairo v. FEPC*, 21 Ill.App.3d 358 (1974). The Illinois Courts have adopted

the "disparate" impact method of analysis used by the U.S. Supreme Court in *Griggs*. See *Burnham City Hospital v. Human Rights Commission*, 126 Ill.App.3d. 999, 467 N.E.2d 635 (1984).

As noted above, the policy in question in this case is not neutral on its face. It explicitly makes age a factor in decisions with respect to which employees receive separation benefits. Thus, we need not consider if the policy in question has the unintended effect of excluding individuals based upon their age.

We next come to the most difficult exception filed by the Respondent. It is the Respondent's contention that even if the denial of separation benefits under the memorandum of agreement can be considered discrimination based upon age, such discrimination is exempted pursuant to Section 2-104(A)(5)(a) of the Human Rights Act. This provision states as follows:

> Nothing contained in this Act shall prohibit an employer, employment agency or labor organization from:
>
> * * *
>
> (5) Merit and Retirement Systems. (a) Applying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.

It is the contention of the Respondent that the memorandum of agreement provides benefits which are inextricably related to the Complainants' retirement system.

The separation benefits provide an alternative to the retirement benefits available to eligible older workers. Accordingly, the Respondent argues that the payment of separation benefits is exempt.

The provision in question was interpreted by the Illinois Supreme Court in the case of *Board of Trustees, etc. v. Human Rights Commission,* 88 Ill.2d 22 429 N.E.2d 1207 (1981). In that case the Illinois Supreme Court rejected the Respondent's interpretation of the exemption. The problem, according to the Supreme Court, is that the Respondent's interpretation of the provision completely ignores the proviso at the end of the Section. That provision states that the retirement system cannot be a subterfuge for, or have the effect of "unlawful discrimination". Among other things, the term "unlawful discrimination", includes discrimination based upon "age". Taken absolutely literally, this proviso would have the effect of annulling the exemption. There would be no need for an exemption if a retirement system did not discriminate on the basis of age. Thus, subsection 5 must be an attempt on the part of the legislature to allow companies to employ certain types of retirement systems, even though the retirement systems discriminate on the basis of age.

The scope of the proviso was set forth quite clearly by the Supreme Court in the *Board of Trustees* case. The Court stated as follows:

> So long as the different standards of compensation or terms, conditions or privileges of employment, that is their overall impact, do not turn the system into one which favors or disfavors employees on the basis of age or any other unlawful discrimination, the system does not run afoul of the proviso. Thus, in the case of

> the differing monthly amounts contributed to a pension plan or the different health benefits in the examples set forth above, the employees' compensation or benefits are based on age. The system is nevertheless legal because it does not have the effect of discriminating against employees based on their age. One employee may have to contribute more per month for pension benefits than another; but that is only because he will be paying for fewer months before he retires. On the whole, the effect is neutral, as would be expected of a practice based on objective considerations. The system even with the differing pension contributions is not only fair and rational, but also necessary to prevent the employer's obligation to hire without regard to age from being undermined by the exorbitant cost of hiring older people. 429 N.E.2d at 1213.

Thus, according to the Supreme Court, an employer can apply different terms, conditions or privileges of employment to older individuals only where the individual's age makes it more likely that the employer will have to pay more money to provide a retirement system which provides *equal* benefits. As noted by the Supreme Court, older workers face different health risks than younger workers. It is not illegal to charge older workers a greater amount of money for health benefits than the amount charged younger workers.

This interpretation by the Supreme Court gives meaning to each part of the exemption contained in subsection 5. At first glance it may appear to be discrimination to charge an older worker more money for health care benefits. Thus, there is a need for a an explicit exemption in the Human Rights Act. On the other hand, the application of different terms, conditions or privileges

of employment pursuant to a retirement system must be based upon increased costs associated with age. Accordingly, there is a need for a proviso which states that the employer is not allowed to apply different terms, conditions or privileges of employment if it does not result in the payment of equal benefits.

In contrast, the construction favored by the Respondent in this case reads the proviso out of the Act. The failure to pay Complainants separation benefits because of their ages is not based on any age related cost factor. Thus, it is clearly "unlawful discrimination" within the meaning of the proviso. Because it is presumed that the legislature meant to give effect to each word in the statute, the Respondent's construction of subsection 5 cannot be correct.

The construction by the Illinois Supreme Court gives effect to each word in the subsection, and is therefore favored. Because the Illinois Supreme Court is, under the Illinois Constitution, the ultimate arbiter with respect to the meaning of Illinois law, the Respondent's exceptions must be rejected.

This conclusion is also supported by the resolution of a similar question under Federal law. As noted above, although Federal cases deciding questions under Federal law are not binding on the Illinois Human Rights Commission, they are helpful in addressing questions which arise under the Human Rights Act. The analogous Federal law is the Age Discrimination in Employment Act (ADEA). 29 USC § 621 et seq. Section 623(F)(2) of ADEA exempts from coverage the application of any bona fide employee benefit plan such as a retirement, pension, or

insurance plan, which is not a subterfuge to evade the purposes of the Act.

The contemporaneous interpretation of ADEA was provided by the Department of Labor, which was – at that time – responsible for enforcing the law. The Department of Labor set forth a regulation which has been adopted by the Equal Employment Opportunity Commission, and which is now codified at 29 CFR ¶1625.10. In pertinent part, the regulation states as follow:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations.
>
> * * *
>
> In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(1)(2), provided that the lower level of benefits is justified by age-related cost considerations.

This contemporaneous interpretation is in direct agreement with the Illinois Supreme Court's interpretation of State law. The Department of Labor interpretation, which is based upon the legislative history of ADEA, has never been overturned. Instead, as noted by the Administrative Law Judge, the administrative interpretation has been explicitly followed by the Federal courts. Thus, in the case of *EEOC v. Westinghouse Electric Corp.*, 725 F.2d. 211 (3d. Cir. 1984) the Third Circuit Court of Appeal found that the denial of separation benefits under circumstances almost identical to the instant case was not exempt under the relevant section of ADEA.

In *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984) the Ninth Circuit Court of Appeals also found that the denial of severance benefits under circumstances identical to the instant case did not qualify for the exemption provided in ADEA. The Ninth Circuit found that severance payments are not an employment benefits plan such as retirement, pension, or insurance, in which there are age related cost factors.

The Sixth Circuit Court of Appeals has adopted the same interpretation of the provision in question. In *Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities*, Nos. 86-3676/4033 (June 3, 1988) the Sixth Circuit stated that Congress intended to relieve employers of the burden of providing equal benefits to all employees only when the cost of providing lower benefits to older workers is approximately equal to the cost of providing greater benefits to younger workers.

This basic interpretation of the exemption in question has been approved in *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988) and *Equal Employment Opportunity Commission v. City of Mount Lebanon, Pennsylvania*, 842 F.2d 1480 (3rd Cir. 1988).

Thus, the Federal precedent on the subject is in accord with the State precedent and supports the determination of the Administrative Law Judge. Based upon all the authority presented to this Commission, it is clear that the Respondent's interpretation of the Human Rights Act is not viable.

Even if there were no authority on this question, the decision of the Administrative Law Judge would still

have to be adopted based upon principles of sound public policy. The justification for the exclusion of the Complainant from separation benefits is crystal clear. It is obvious that both the Respondent and the Complainants' union wanted to provide some type of monetary support to employees who would be thrown out of work by the termination of the Respondent's business. Individuals such as the Complainants are excluded from the provisions of the agreement because they are eligible for retirement. In other words, individuals such as the Complainants could soften the blow of termination by electing to take early retirement.

The problem with this arrangement is that it assumes that an individual who has reached age 55 and is eligible for early retirement should react to the termination of his or her employment by taking early retirement, rather than by attempting to get another job, and postponing retirement until that person wants to retire. In the case at bar a younger individual who is terminated will be given a separation benefit which will ease the impact of employment while that worker looks for another job. If the worker is able to attain another job, he or she can afford to decline their early retirement option at age 55, and receive full retirement on the normal retirement date. On the other hand, the worker who is age 55 or older on the date of the termination is not given a separation benefit which can be used while that person is looking for alternative work. If the older worker does not find alternative work soon after he or she becomes unemployed, the worker will be forced to take early retirement. This will prevent the worker from taking the full, normal retirement at a later date.

Section 2(b) of the retirement plan provides that a worker who takes early retirement loses 4/10 of 1% of his full retirement benefit for each month by which the worker has not attained 62 at the age of retirement. Thus, an employee who is forced to retire at age 55 would lose one third of his normal retirement benefits. Just as it is illegal to force an individual to retire because that person has reached a certain age (*Board of Trustees v. Human Rights Commission*, supra), it is illegal to force an individual to take an early retirement option because of that individual's age. Although the Respondent in this case did not "force" the Complainants to take the early retirement option, it did not give the Complainants the same separation benefits as younger workers, which would allow the Complainants to endure a period of unemployment without dipping into their retirement money.

In sum, the argument set forth by the Respondent has been rejected by the Illinois Supreme Court and by Federal circuit courts of appeal. Furthermore, it is contrary to the long standing administrative interpretation of Federal law, and the clear purpose of the Human Rights Act. Under the circumstances, the Respondent's exception must be denied.

The Respondent has filed a number of further exceptions to the Recommended Order and Decision which are merely reiterations of arguments made to the Administrative Law Judge. The reasons for Judge Patton's rejection of those arguments are well stated in the Recommended Order and Decision and it will serve little purpose to repeat those arguments in this Order and Decision. After carefully considering the arguments of the Respondent, we find that Judge Patton's rejection of the Respondents

further defenses was well supported by the record, and based upon sound legal conclusions. Accordingly, all of the Respondent's exceptions will be denied.

III. THE COMPLAINANTS' REQUEST TO PRESENT ADDITIONAL EVIDENCE

The Complainant has asked the Commission permission to present additional evidence with respect to monetary damages and attorney's fees. The Respondent was granted until March 28, 1988 to file a response to the Complainants' motion to present additional evidence. As of this date, no response has been filed.

With respect to the Complainants' request to present additional evidence with respect to attorney's fees, the motion is denied. Chief Judge Patton gave the Complainants sufficient time to present attorney's fees petitions, and the Commission has not been presented with any justification for the failure to present the petition during the time period granted.

The other portion of the motion has to do with the amount of separation benefits which each Complainant would have received had they been included in the memorandum of agreement. This appears to be a matter of mathematical calculation, and the Respondent has not filed any objections to the numbers submitted by the Complainants. Because there does not appear to be any dispute with respect to the amount of money which would have been received had the Complainants' been allowed to participate in the separation benefits program, the portion of the Complainants' motion which asks leave

to present additional evidence with regard to monetary damages is granted.

IT IS THEREFORE ORDERED:

1. That the complaints of Roland Berglund, John Campbell, Margaret Dreesen, Edmund Henkelman, Oleta Britt, Elden Amans, Florence Maycraft, Dwight Van Fleet, Gerald Stahl, James Breseman, Thomas Ivy, Charles Rewerts, Godfrey Farrell, John Downing, Arthur Helgerson, and Walter Pierce are sustained.

2. That the Recommended Order and Decision of the Administrative Law Judge is affirmed, adopted by the Commission and incorporated by reference herein.

3. That the Respondent shall pay the individual Complainants the following amounts:

A. Edmund Henkelman	$3,072.80
B. Oleta Britt	3,040.00
C. Elden Amans	2,992.00
D. Florence Maycraft	3,040.00
E. Dwight Van Fleet	3,072.80
F. Gerald Stahl	3,372.80
G. James Breseman	3,316.80
H. Charles Rewerts	3,372.80
I. Godfrey Farrell	3,347.20
J. Thomas Ivy	2,543.80
K. John Downing	3,321.60
L. Arthur Helgerson	3,372.80
M. John Berglund	9,434.07
N. Margaret Dreesen	7,144.72
O. John Campbell	12,870.00
P. Walter Pierce	3,456.00

4. That the Respondent shall cease and desist from discrimination based upon age with respect to separation benefits.

5. That all motions and exceptions not previously dealt with by the Commission and not specifically mentioned in this Order and Decision are hereby denied.

6. That this Order and Decision is final, enforceable and appealable.

(Commissioner Manuel Barbosa, Commissioner Mervin N. Bachman, Commissioner Grace Kaminkowitz)

HUMAN RIGHTS COMMISSION

/s/ Manuel Barbosa
Manuel Barbosa

/s/ Mervin N. Bachman
Mervin N. Bachman

/s/ Grace Kaminkowitz
Grace Kaminkowitz

Entered: June 28, 1988

69510

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 31, 1990

Ms. Deborah L. Ahlstrand
Asst. Attorney General
100 W. Randolph St., 12th Flr.
Chicago, IL 60601

No. 69510 – The Babcock & Wilcox Company, respondent, v. Illinois Human Rights Commission, et al., petitioners. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 22, 1990.

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

29 U.S.C. §1144:

§1144 Other Laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USC §1003(a)] and not exempt under section 4(b) [29 USC §1003(b)]. This section shall take effect on January 1, 1975.

* * *

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 [29 USC §1031] and 507(b) [29 USC

§1137(b)]) or any rule or regulation issued under any such law.

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

29 U.S.C. §623(a) & (f)(2):

§623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act [29 USC §§621 et seq.].

* * *

(f) lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization –

* * *

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act [29 USC

§§621 et seq.], except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 USC §631(a)] because of the age of such individual;. . . .

ILLINOIS HUMAN RIGHTS ACT

Ill. Rev. Stat. ch. 68, ¶1-103 (Q) (1987):

§1-103 General Definitions. When used in this Act, unless the context requires otherwise, the term:

(Q) Unlawful Discrimination.

"Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service as those terms are defined in this Section

Ill. Rev. Stat. ch. 68, ¶2-102 (A) (1987):

§2-102. Civil Rights Violations – Employment. It is a civil right violation:

(A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination.

Ill. Rev. Stat. ch. 68, ¶2-104 (5)(A) (1987):

§2-104 Exemptions Nothing contained in the Act shall prohibit:

an employer, employment agency or labor organization from:

* * *

(5) Merit and Retirement Systems.

(a) Applying different standards of compensation, or different terms, conditions or

privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.

No. 89-1704 (2)

FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Petitioners,

v.

BABCOCK & WILCOX COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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June 4, 1990

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No. 89-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Petitioners,

v.

BABCOCK & WILCOX COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Babcock & Wilcox Company[1] respectfully requests that this Court deny a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court for the Second Judicial District, entered in the above proceeding on October 13, 1989.

[1] Babcock & Wilcox Company is a wholly-owned subsidiary of McDermott Inc., which in turn is a wholly-owned subsidiary of McDermott International Inc.

SUMMARY OF ARGUMENT

The petition should be denied because any decision by this Court would have no effect on the outcome of the case in the Illinois courts and would be an advisory opinion.

ARGUMENT

The petition presents two questions for review: (1) whether application to this case of the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, § 1-101 *et seq.*, pursuant to which the case was brought in the Illinois courts, is preempted by Section 514 of the Employee Retirement Income Security Act, 29 U.S.C. § 1144, and (2) whether, assuming it is so preempted, Section 4(f)(2) of the federal Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2), permits an employer to provide for severance benefits to all employees terminated upon a plant closure except those immediately eligible for a pension.

The petition should be denied, if for no other reason, because, were this Court to grant the petition, whichever way it decided the two questions presented would not affect the outcome of the case in the Illinois courts. This Court's Rule 10 provides a "petition for a writ of certiorari will be granted only when there are special and important reasons therefor." There is no special and important reason to review a question that will have no effect on the outcome of a case, and, understandably, this Court is not in the habit of accepting cases that are, as a consequence, of no more than academic consequence.

As for the first question—whether the state statute is preempted—if this Court were to hold that the state statute under which the case arose is preempted by federal law, that would be the end of the matter. The judgment of the Illinois courts rejecting petitioners' claim would not be disturbed. The claim was made under the state statute. If the state statute could not be applied, there would be nothing left of the case. The review exercise would have been of academic interest only and thus not the kind of matter over which this Court takes jurisdiction.

Fay v. Noia, 372 U.S. 391, 429-30 (1963) ("The federal question was moot; nothing turned on its resolution.").

If, on the other hand, this Court were to hold that the Illinois statute is not preempted, it would make no difference to the outcome of the case because the Illinois Appellate Court held that, in any event, respondent did not violate the Illinois statute, pursuant to which the case was brought and which would apply if there were no preemption, when respondent provided for severance pay except to employees immediately eligible to retire.

> "This case was initiated by a complaint filed with the Illinois Human Rights Commission by the Department of Human Rights (the Department) on behalf of certain former employees of petitioner, the Babcock & Wilcox Company (B&W). The complaint charged that B&W violated section 2-102(A) of the Illinois Human Rights Act (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A)) (Human Rights Act) by maintaining and implementing a severance pay policy which denied severance pay to complainants because they were eligible to retire on pensions, which was alleged to be an impermissible age-related criterion.
>
> * * *
>
> "On June 28, 1988, the Commission entered an order affirming the recommended order and decision, finding that B&W's severance policy was facially discriminatory, and B&W's exceptions were denied.
>
> * * *
>
> ". . .We next consider the substantive provisions of the Human Rights Act . . . as they relate to this case.
>
> "It is a civil violation under the Illinois Human Rights Act '[f]or any employer to refuse to hire, to

segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination.' (Ill. Rev. Stat. 1987, ch. 68, par. 2-102(A).) The Human Rights Act defines 'unlawful discrimination,' in part, as discrimination against a person because of age. (Ill. Rev. Stat. 1987, ch. 68, par. 1-103(Q).) 'Age' is defined, to the extent pertinent here, as 'the chronological age of a person who is at least 40 years old.' (Ill. Rev. Stat. 1987, ch. 68, par. 1-103(A).) Thus, only persons who are at least 40 years of age are in the protected class. There is no dispute that the claimants here are in the protected class or that B&W is an employer as defined in the Human Rights Act. The Human Rights Act also provides that an employer is not prohibited from '[a]pplying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.' Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a).

* * *

"We too conclude that an employer need not meet a cost-justification requirement to be eligible for the exemption under section 2-104(5)(a) of the Human Rights Act, and reject the contrary conclusion of the administrative law judge and commission in the present case. Like the Federal statute, the Human Rights Act does not mandate such a rule. Further support for our conclusion is the fact that an employer's costs which are associated with providing retirement benefits do not always increase with age. *Betts*, 492 U.S. at ____ n.5, 106 L. Ed. 2d at 152 n.5, 109 S. Ct. at 2864 n.5 (in a defined contribution plan an employer's contribution is fixed and an employee will receive a level of benefits dependent on the amount

contributed; thus, an employer's cost for making contributions is totally unrelated to an employee's age).

* * *

"Given the similarities between the Age Discrimination Act and the Human Rights Act, and the Human Rights Act's similar purpose of encouraging the employment of older workers [*citation omitted*], we conclude that a retirement system in Illinois may be considered as a subterfuge for unlawful age discrimination only if the employee proves that the system was intended to discriminate in a nonfringe benefit aspect of the employment relation, which was not shown here.

"We next consider whether B&W's decision not to pay severance pay to those employees who were eligible to receive retirement pension benefits was pursuant to a retirement system and, if so, whether that system had the effect of unlawful discrimination within the meaning of section 2-104(5)(a) of the Human Rights Act (see Ill. Rev. Stat. 1987, ch. 68, par. 2-104(5)(a)). We believe that the phrase 'retirement system' must be construed here in light of the special circumstances which exist in a plant closure case. To 'retire' generally means '[t]o terminate employment or service upon reaching retirement age.' (Black's Law Dictionary 1183 (5th ed. 1979).) A 'system' is an '[o]rderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to some rational principle.' (Black's Law Dictionary 1300 (5th ed. 1979).) B&W's severance-pay policies were undoubtedly part of a 'system' in that it sought to provide a source of income to all employees upon termination of its Rockford, Illinois, operation. The more difficult question is whether that system may be considered as a 'retirement system' under Section 2-104(5)(a).

"It is apparent that these complainants did not retire in the conventional sense of the word; they were in fact terminated from B&W's employ not because of their age but because B&W ceased its operations in Rockford, Illinois. But, both complainants and the other employees who did receive severance benefits were retired in the sense that both groups of employees were terminated from B&W's employ. In our view, B&W's severance policies on its closure constituted a 'retirement system' as they were designed to achieve the same result as would a traditional retirement system in the ordinary sense of that term, that is, B&W's severance policies, like a retirement plan, ensured that its employees receive a source of income upon termination from their employment. B&W's retirement policies did not have the effect of unlawful discrimination as all terminated employees received compensation from B&W by means of an age-neutral employer action. Furthermore, there is no evidence that B&W's retirement system was intended to discriminate in a nonfringe aspect of the complainants' employment relation with B&W.

"Because of our disposition of this issue, we need not consider B&W's further contention that the claims of those complainants who were hourly employees were waived by the contract entered into on March 22, 1983, between B&W, UAW and the Union.

"The summary judgment of the Human Rights Commission is reversed and the cause remanded for further proceedings consistent with this opinion.

"Reversed and remanded."

(Petition, App. 1, 2, 9, 23, 24, 26, 28-30.)

* * *

Because the Illinois courts thus acted on an independent and adequate state ground, this Court has no authority to review

their judgment. *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Fay v. Noia*, 372 U.S. at 429-30, 430 n.40; *Lynch v. New York*, 293 U.S. 52 (1934); *see also Uhler v. American Federation of Labor-Congress of Industrial Organizations*, 468 U.S. 1310, 1311 (1984).

As for the second question presented by the petition – whether, if application of the Human Rights Act is preempted, Section 4(f)(2) of the federal Age Discrimination in Employment Act permits severance pay to employees except those eligible immediately to retire – this case was brought under the Illinois Human Rights Act and to enforce only that law, not the federal Age Discrimination in Employment Act (Petition, App. 2). While it is true that the Illinois Appellate Court, in interpreting the relevant provisions of the Illinois Human Rights Act, adverted to this Court's reading in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. ____, 109 S. Ct. 2854 (1989), of certain provisions of the federal Age Discrimination in Employment Act, it was the Illinois law that was at issue in the Illinois courts and the meaning of that law that was decided there. Even if this Court were to hold that Section 4(f)(2) of the federal Age Discrimination in Employment Act preempts the Illinois law, the outcome of the case decided by the Illinois courts would not be affected. The only claim made was under the state statute (Petition, App. 2). If the state law could not be applied, the case would be at an end. What petitioners are looking for from this Court is therefore an advisory opinion regarding federal law which they could then use to try to persuade the Illinois courts that they were incorrect in their interpretation of a state statute. This Court is, of course, not in the business of giving advisory opinions. *Fay v. Noia*, 372 U.S. at 429-30. It "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297, *reh'g denied*, 352 U.S. 859 (1956). Contrary to petitioners' contention at pages 6 and 7 of their brief, no federal question under the Age Discrimination in Employment Act would survive, jurisdictionally, a ruling by this Court that application of the Illinois Human Rights Act is preempted. *See Fox Film Corp. v. Muller*, 296 U.S. 207; *Lynch v. New York*, 293 U.S. 52.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

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